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No. 616

IN THE

SUPREME COURT OF THE UNITED STATES

G. S. SINCLAIR, et al.,

Plaintiffs and Petitioners,

vs.

STATE OF CALIFORNIA, et al.,

Defendants and Respondents.

PETITION FOR WRIT OF CERTIORARI

PHILL SILVER
1680 North Vine Street
Hollywood 28, California

Attorney for Petitioners.

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PETITION FOR
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TO THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT:

STATEMENT OF JURISDICTION

The appellants submit herewith their statement particularly disclosing the basis upon which this Court has jurisdiction to review the judgment of the District Court of Appeal in Fourth Civil No. 6423, in which the Supreme Court of California denied a hearing.

THE OPINIONS BELOW

The opinion of the District Court of Appeal is reported in the Advance Sheets; a copy of the opinion is attached hereto as Appendix "A".

I.
JURISDICTION

The jurisdiction of this Court is conferred by 28 U. S. C. A. Sec. 1257(2). This is a petition for a review from a decision of the District Court of Appeal affirming a judgment rendered by the Superior Court of Los Angeles County sustaining a demurrer without leave to amend. The California Supreme Court denied without opinion a petition for a hearing. By said decision, the District Court of Appeal and the Supreme Court, respectively, upheld a judgment of the lower court which had held that a resolution of necessity adopted by a highway commission in the selection of a freeway route could not be judicially reviewed by the court. By said decision the Appellate Court and Supreme Court respectively held that a resolution created a conclusive presumption and could not be judicially reviewed on any grounds including the grounds of arbitrariness, capriciousness or abuse of discretion.

The appellants and petitioners herein contend that the Superior Court of Los Angeles County by sustaining a demurrer without leave to amend preventing and refusing to judicially review a resolution adopted by the Highway Commission on the grounds stated in said Superior Court action have denied due process

of law to the appellant petitioners herein in violation of the Fourteenth Amendment of the United States Constitution.

II.

CASES BELIEVED TO SUSTAIN THE JURISDICTION OF THE COURT.

The appellant petitioners have been denied due process of law in the primary sense in that they have not been given a full opportunity to present their case before the proper court.

Crane v. Hahlo, 258 U. S. 142, 145;

Chicago v. Chicago, 166 U. S. 226;

Cincinnati v. Vesper, 281 U. S. 439;

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Ex parte Virginia, 100 U. S. 339, 348;

Scott v. McNeil, 154 U. S. 34, 45, 46;

Great Northern Railway v. Washington, 300 U. S. 154, 167;

Dower v. Richards, 151 U. S. 658.

III.

STATEMENT

The applicable statute is section 90 of the Streets and Highways Code of California:

> "The Department shall have full possession and control of all state highways and all property and rights in property acquired for state highway purposes. The department is authorized and directed to lay out and construct all

state highways between the termini designated by law and on the most direct and practicable locations as determined by the Commission."

IV.

THE PROCEEDINGS IN THE SUPERIOR COURT.

The petitioners instituted an action in the Superior Court to declare section 90 of the Streets and Highways Code unconstitutional for uncertainty; to declare a resolution adopted by the Highway Commission to be unconstitutional because of unconstitutional delegation of authority; and to declare the resolution adopted to be invalid because of abuse of discretion.

The Superior Court sustained a demurrer without leave to amend. Petitioner's motion for reconsideration of the order sustaining the demurrer without leave and for permission to file an amended complaint was denied. The Superior Court without opinion entered a judgment of dismissal.

V.

THE APPEAL TO THE DISTRICT COURT OF APPEAL.

An Appeal was taken to the District Court of Appeal. On July 28, 1961, the District Court of Appeal affirmed the judgment of dismissal.

A copy of the decision is attached in the addendum.

VI.

THE PETITION FOR A HEARING TO THE CALIFORNIA SUPREME COURT.

A petition for a hearing was filed with the California Supreme Court which was denied without opinion on September 20, 1961.

VII.

THE LEGAL EFFECT OF SECTION 90 OF THE STREETS AND HIGHWAYS CODE.

The Superior Court in sustaining a demurrer without leave to amend, and in refusing to permit the filing of an amended complaint, placing in issue the violation of the Fourteenth Amendment of the United States Constitution, in effect held that the action of a highway commission in the selection of a freeway may not be judicially reviewed. The District Court of Appeal in affirming the judgment of dismissal held that section 90 of the Streets and Highways Code was not unconstitutional because of the alleged uncertainty and that the factual determination that a particular route is the most direct and practicable location for a highway is not subject to judicial review. The Appellate Court said,

" * * * the charges of alleged

misconduct do not constitute an abuse of discretion, but in fact are an attack upon the wisdom of its action, which is not subject to judicial review."

The Appellate Court also said,

"The due process clause of the United States Constitution does not require either a hearing preliminary to the selection of a highway route, nor a judicial review of the decision of the Commission in making such a selection."

VIII.

QUESTION PRESENTED

1. Did the Superior Court of Los Angeles County, the District Court of Appeal and Supreme Court, respectively, in determining that action taken under section 90 in selecting a freeway route constitutes a quasi legislative act of the Streets and Highways Code of the State of California, which may not be judicially reviewed for failure to comply with conditions precedent or the grounds of arbitrariness, capriciousness or abuse of discretion, deny due process of law to the Petitioners in violation of the Fourteenth Amendment of the United States Constitution?

In Saunders v. Shaw, 244 U. S. 317, it was held that a decree rendered by the Supreme Court of Louisiana without a trial upon an issue of fact in the trial court deprived an intervenor

of his property without due process of law because the case had been decided against him without his having had an opportunity to present his evidence.

In Georgia v. Decatur, 295 U. S. 165, 171, the Supreme Court said:

> "The refusal of a court to receive or consider any proof whatsoever on the subject amounts to a denial on a hearing on that issue in contravention of the due process clause of the constitution. "

Citing Saunders v. Shaw, 244 U. S. 317, 319;

Bandini v. Superior Court of Los Angeles County, 284 U. S. 8, 19.

IX.

SECTIONS 90 AND 103 OF THE STREETS AND HIGHWAYS CODE IF CONSTRUED TO DENY A JUDICIAL REVIEW VIOLATES THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

A number of courts have upheld the constitutionality of conclusive presumption statutes applicable to highway commissions on the ground that a right of judicial review was authorized by implication; otherwise, the statute would be unconstitutional.

In People v. Illinois State Toll Highway

Commission, 120 N. E. 2d 35, 43, in upholding the constitutionality of the State Highway Commission Act of the State of Illinois, the Supreme Court of Illinois nevertheless said:

> "Plaintiff asserts that section 19 of Article II of the State Constitution, which provides that every person shall find a ready remedy in the law for injuries and wrongs received, is violated by the last sentence of section 28 of the Act making the commission's determinations in the area of its discretionary powers conclusive and not subject to review. We construe this section as being limited to discretionary matters as long as the administrative body exercises its powers within the confines of its statutory authority. Recourse to the courts is not denied where bad faith, fraud, corruption, manifest oppression or a clear abuse of discretion enters into the commission's determinations. The presence of any of these conditions will give ready access to the courts. The determinations of the commission can constitutionally be made conclusive so long as none of the above evils are present. In reality this statutory language is no more than an express declaration of a rule of law, long in existence in this state. (Citing cases.) We have consistently followed the policy of adopting such construction of a statute as will uphold the validity of the statute rather than one which would render it unconstitutional." (Emphasis added.)

In Prunk v. Indianapolis Redevelopment Commission, 93 N. E. 2d 171, Sup. Ct. Indiana, an action was brought to review the action of the Redevelopment Commission in overruling plaintiff's objections and in confirming the Commission's declaratory resolution for the development of a blighted area. The Supreme Court held that the provision in the redevelopment act denying an appeal from the judgment of the trial court was unconstitutional and that the right of the trial court to review the proceedings cannot be limited to the question of public utility and benefit to acquire the blighted area in question.

X.

PROCEEDINGS IN EMINENT DOMAIN ARE SUBJECT TO "DUE PROCESS" REQUIRED BY THE UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.

"Although there was at one time some question as to the applicability of the Fourteenth Amendment to limit the powers of the State even though all the requirements of the state Constitution may be complied with, it clearly applies where the taking is for a private use or without just compensation, and in eminent domain proceedings to insure the landowner in any case of due process in any procedure under which his land is taken."

11 Am. Jur. 1108, Sec. 318.

To the same effect:

11 Cal. Jur. 2d 613, Sec. 205;

17 Cal. Jur. 2d 589, and cases cited, Note 4.

The Appellate Court declared that the "due process clause" of the United States Constitution does not require either a hearing preliminary to the selection of a freeway route nor a judicial review of the decision, of the Commission in making such a selection. If this be true that no hearing need be held before the Commission, then defendants must be entitled to a hearing before the court on the issue of arbitrariness, capriciousness and abuse of discretion.

> "To constitute due process, a legal proceeding must give the parties adequate means of asserting their rights. To this end, due process requires that a tribunal that assumes to determine the rights of the parties shall have jurisdiction over the parties and over the subject matter of the proceeding, and that the parties shall be given notice and an opportunity for hearing, before any order or judgment in the proceedings can be made by which they will be deprived of life, liberty, or property. The jurisdictional requirement means that the tribunal hearing a case must be duly constituted in accordance with law, and that the case be one that the tribunal is

authorized to consider. Jurisdiction of the person, moreover, as well as opportunity for hearing, depends in turn on notice being given to the person, so that the requirements of due process are to that extent overlapping. * * *

"The notice must be a real and reasonable one, and the hearing must be such as ordinarily, or at least reasonably, is given in similar cases. Only after such notice and hearing does the action of the court have validity so as to withstand attack. Subject to these two essential conditions, which seem to be universally prescribed in all systems of law in civilized countries, the United States Supreme Court has sustained a variety of laws, statutory or judicially declared, regulating procedure, evidence, and the method of trial, and held them to be consistent with due process. But any procedure excluding these essential elements might be said to be abhorrent to our ideas of law and justice.

"It is clear that there can be no due process in the absence of the essential elements of notice and opportunity for hearing. * * * "

11 Cal. Jur. 2d 788 (Constitutional Law), Sec. 313.

A good case pointing out the distinction between the portion of an administrative order which is conclusive upon the courts and the

part that may be inquired into by the courts is Monolith, Etc. Cement Co. v. Gillbergh, 129 Cal. App. 2d 413, where it was said:

> "Of course, the Land Department has no power to strike down any claim arbitrarily, but so long as the legal title remains in the government it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid, and, if it be found invalid, to declare it null and void.
>
> "There is no question that due process was observed here. Due process in this situation implies notice and a hearing. Such a hearing must not of necessity be in the courts; it may be before the appropriate administrative agency." (129 Cal. App. 2d at p. 417).

Thus Petitioners do not contend that a good faith determination of the route for a freeway by the Highway Commission would not have been conclusive upon the trial court, but we do contend that when Appellants' property was to be taken by a decision allegedly based upon arbitrariness, capriciousness and gross abuse of discretion, that the court has jurisdiction to inquire into the acts of the Commission to determine their validity. Any other rule would be an elementary taking of property without due process of law. It would make the Commission above the law and above the courts.

The statutory provisions of Streets and Highways Code, Section 103, holds only that

the decision of the administrative body is conclusive in the discretionary phases of its acts. There must be implied in this section the provision that the acts be free from fraud, collusion, bad faith or abuse of discretion -- not mere difference of opinion, but abuse of discretion -- which means that the discretion granted by the legislature was not in fact honestly and fairly exercised but was exercised without any sound or reasonable basis in fact. If this qualification is not read into the statute, then it is clearly unconstitutional and violative of the United States Constitution, Fourteenth Amendment, and California Constitution, Article I, Section 14.

The Supreme Court of the State of Washington, in passing upon the conclusiveness of the question of such acts by administrative bodies and the right of the courts to inquire into such acts to determine whether they are arbitrary or taken in bad faith, points out that this exception is expressly written into the Washington statute, but that the court would have arrived at the same conclusion on constitutional grounds without the statutory provision:

> "Realtors argue that the taking of their entire acreage is constructively arbitrary and capricious because the evidence shows that the whole tract is not necessary for actual highway construction. In support of their position, realtors cite State v. Superior Court, (Wash.), 222 Pac. 208, 209. We there held that, under the peculiar

circumstances of that case (which differ substantially and materially from the facts now before us), the conduct of the highway authorities in selecting a proposed route was constructively arbitrary, although no actual bad faith or arbitrary, capricious, or fraudulent conduct was shown to exist. We said:

"The Legislature by Law of 1921, ch. 32, p. 116 (Sec. 6766, Rem. Comp. Stat. [P. C. Sec. 6786]), has established the law relative to this situation, where this situation appears:

"' * * * And in such action the selection of the land by the Supervisor of Highways shall, in the absence of bad faith, arbitrary, capricious or fraudulent action, be conclusive upon the court and judge before which the action is brought that said lands are necessary for the purpose sought.' * * * "

State v. Superior Court (Washington), 325 P. 2d 300, 308.

The original construction of the statute seems to appear in State ex rel. Postal Telegraph Co. v. Superior Court, 64 Wash. 189, 116 Pac. 855, where the court said:

"We believe that the correct construction of this statute is that those vested with the power of eminent domain have the right in the first instance to

> select the land which, according to their own views is most expedient for the enterprise, and that it invests the court with the power to determine * * * the question of necessity for the taking of such specific land when there is evidence of bad faith, or oppression, or of an abuse of the power in the selection. "

Nor can this fundamental right to attack in the courts the acts of an administrative body tainted with fraud, collusion, bad faith or abuse of discretion, be circumvented by the guise of holding that the ordinance is conclusive evidence of the public necessity and that the location is the most compatible with the greatest public good and the least private injury.

Streets and Highways Code, Section 103, providing that the resolution of the commission shall be conclusive, cannot apply to the validity of their acts on grounds on which they are here attacked by Petitioners. If a wrongful act can be made unassailable merely by making the act conclusive evidence of its correctness any constitutional rights could and would be destroyed. No act of an administrative body can be beyond scrutiny by the courts to see that discretion is honestly exercised nor can it be free from meeting the charge of having violated the due process of law requirement through fraud, arbitrariness, caprice or bad faith.

> "A conclusive presumption, or a presumption that operates to deny a fair opportunity to repel it, violates the due

process clause."

12 Am. Jur. 317, Sec. 625.

The question was before the United States Supreme Court on the validity of the California statute relative to a claim of exemption on property taxed, when that court said:

> "It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions." (Citing Bailey v. State of Alabama, 219 U. S. 219, 239, 31 S. Ct. 145.)

Speiser v. Randall (June 30, 1958), 78 S. Ct. 1332, at p. 1342.

In Heiner v. Donnan, 285 U. S. 312, at page 329, it is said:

> "This court has held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment."

The Petitioners do not challenge the discretionary power of the Highway Commission to select a freeway route and to thereby determine the necessity for the land required.

However, it does appear from the reservation by the United States Supreme Court in Carmack v. United States, 329 U. S. 230, 247, and from Simmonds v. U. S., 199 Fed. 2d 305, 306, that this discretionary power is subject to limited review for "plain abuse" or "capricious and arbitrary" action.

Other cases also so indicating are the following:

Moore v. Foster, 336 P. 2d 39, 54 (Oregon);

State v. Dawson, 171 P. 2d 189 (Wash.), 173 A. L. R. 1351;

Atwood v. Willacy, 271 S. W. 2d 137, 143 (Texas);

McAuliffe v. Boston, 133 N. E. 2d 493;

Dahl v. Indiana, 157 N. E. 2d 194;

U. S. v. Certain Parcels of Land, 30 F. Supp. 372, 379.

"The only open question therefor is whether in exercising this power the Secretary has acted arbitrarily or capriciously. If he has done so there is ample judicial authority to the effect that the courts may intervene to restrain the exercise of the power."

XI.

THE RESOLUTION OF THE HIGHWAY COMMISSION UNDER SECTION 103 OF THE STREETS AND HIGHWAYS CODE, IS SUBJECT TO JUDICIAL REVIEW NOTWITHSTANDING THAT THE STATUTE PROVIDES THAT SUCH A RESOLUTION SHALL BE CONCLUSIVE EVIDENCE.

Section 103 of the Streets and Highways Code, provides as follows:

> "The resolution of the commission shall be conclusive evidence: (a) of the public necessity of such proposed public improvement, (b) that such real property or interest therein is necessary therefore, (c) that such proposed public improvement is planned or located in a manner which will be most compatible with the greatest public good and the least private injury."

The courts have on numerous occasions held that a judicial review may be had of a statute which provided that a certain decision shall be final and conclusive.

In Auffmordt v. Hedden, 137 U. S. 310, the Supreme Court held that a statute making an appraisal of merchandise for import duties "final and conclusive" had the effect of making the appraisal final and conclusive in absence of fraud.

A statute making "final and conclusive" a determination of a veteran's claim for adjusted compensation was interpreted to mean that the determination "is final, at least unless it be wholly without evidential support or wholly dependent upon a question of law or clearly arbitrary or capricious." (U. S. v. Williams, 278 U. S. 255.)

The Railway Labor Act, which provides that "awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award," has been interpreted to mean that awards which do not contain a money award are not final on a question whether a union was an authorized representative of an employee.

Elgin v. Burley, 325 U. S. 711, 327 U. S. 661.

Additional cases holding conclusive presumption statutes to be subject to judicial review where constitutional rights are involved are the following:

The California courts have uniformly granted judicial review where railroad commissions have either exceeded their jurisdiction or refused to exercise jurisdiction which they possessed.

Allen v. Railroad Commission, 179 Cal. 68, 75.

In Traber v. Railroad Commission, 183 Cal. 304, 307, the Supreme Court said:

"Notwithstanding the declaration of section 67 that the Commission's determination of matters of fact are not subject to review, it must be held that its determination upon the question of whether or not the facts existing are sufficient to bring the case within the scope of its powers must be subject to review, so far as they present a question of law bearing upon that subject, and that the provision that the 'conclusions' of the Commission on the facts are final does not apply to facts necessary to the existence of the jurisdiction of the Commission to act."

In Chicago v. Minnesota, 134 U. S. 418, a conclusive presumption statute was held to be in conflict with the Constitution of the United States as depriving the company of its property without due process of law, and depriving it of the equal protection of the law.

XII.

THE CALIFORNIA COURTS HAVE INCORRECTLY INTERPRETED AMERICAN LAW ON THE ISSUE OF JUDICIAL REVIEW OF THE ACTS OF A HIGHWAY COMMISSION.

The basic question presented in this case is whether or not property owners may appeal to the courts on a charge that a highway commission has acted arbitrarily, capriciously and with gross abuse of discretion. In other words,

the basic question is whether or not the potential condemnees may be heard to attack the integrity of a condemning body or the proceedings to be taken by a condemning body.

It is not contended by the Petitioners that they have any right to be heard on the factual question of "necessity". It is admitted that the determination of the legislature, through its duly constituted administrative agent, on this issue is conclusive if, but only if, the decision on the issue of necessity has been reached honestly and in good faith.

There has never been any question, and there can never be any question, under a government of constitutional law and under a government following the doctrine of judicial supremacy, of the power of the courts to determine in the first instance whether any administrative body in reaching the decision on which it acts has reached this decision in a lawful manner. The courts may inquire into whether or not the administrative body was lawfully constituted, lawfully convened, lawfully considered the question at hand, and lawfully reached a decision.

Many cases hold that the question of necessity is a legislative question and may not be reviewed by the courts, and undoubtedly some of the decisions state this rule in language so broad that they might seem to imply that a court could never review the act of an administrative body on the issue of necessity even if fraud is involved. And yet this must be patently wrong as a rule of law, when we know

that the court, and the court alone has a right of judicial supremacy to determine in the first instance whether the administrative body is lawfully constituted, has lawfully reached a decision; and it has not lawfully done so if it has done so capriciously or in bad faith. It is a fundamental axiom that fraud cuts a swath across all law and the courts are not foreclosed and cannot be foreclosed from staying proceedings if these conditions exist.

Numerous courts both State and Federal have carefully pointed out the distinction between a determination where the issue of necessity is solely one of discretion, and the determination where the issue is one of arbitrariness and bad faith.

Every text writer, where the distinction between the issue of necessity and the issue of fraud, et cetera, has been raised, clearly states that a justiciable issue is raised by an allegation of fraud in the determination of necessity. The basic all-inclusive American work, Corpus Juris Secundum, states:

> "The legislature may delegate the power of determining the necessity of exercising the power of eminent domain, and in the absence of contradictory legislative provision the decision of the grantee of the power is not subject to judicial review except for fraud, bad faith or abuse of discretion." (Emphasis ours.)
>
> 29 C. J. S. 882, 889(b).

The leading author on eminent domain, Nichols, has this to say on the limitation of the legislative power and reciprocally the power of the courts:

> "There is, however, at least a theoretical limit beyond which the legislature cannot go * * * while many courts have used sweeping expressions in the decisions in which they have disclaimed the power of supervising the selection of the site of public improvements it may be safely said that the courts of the various states would feel bound to interfere to prevent an abuse of the discretion delegated to the legislature by an attempted appropriation of land in utter disregard of the possible necessity of its use, or when the alleged purpose was a cloak to some sinister scheme. In other words, the court would interpose in a case in which it did not merely disagree with the judgment of the legislature, but f felt that that body acted with total lack of judgment or in bad faith. In every case, therefore, it is a judicial question whether the taking is of such a nature that it is or may be founded on a public necessity * * * .
>
> "It being settled that, while necessity is not primarily a judicial question, there may be such absolute lack of necessity as to render the proceedings void, it necessarily follows that an owner who alleges such lack

of necessity is entitled to have the question passed upon by a judicial tribunal." (Emphasis ours.)

1 Nichols on Eminent Domain (3d Ed.) 377, §4.11(2).

See numerous cases cited in footnotes 93 and 94.

In California, Mahoney v. Spring Valley Waterworks Co., 52 Cal. 159, it is stated that a statute which would undertake to confer . . .

"* * * the power of ascertaining without limit, what property was necessary to the public use * * * would be an attempt to authorize one person to appropriate the property of another and would be violative of the constitutional provision that no person shall be deprived of life, liberty, or property, except by due process of law." (p. 163)

An excellent review of the distinction between reviewing necessity on the one hand and the question of bad faith in determining necessity, on the other hand, is contained in 28 So. Cal. Law Rev. 369. At least six times in the author's article he carefully points out that necessity is conclusive upon the courts "unless shown to be arbitrary, capricious or in bad faith."

"The rule is generally stated that an administrative decision as to

necessity is conclusive unless show
to be arbitrary, capricious or in ba
faith."

28 So. Cal. Law Rev. 377.

"The courts are called upon to decide questions of fraud in cases at law or equity in which this issue arises. These are not issues foreign to judicial decisions. Hence the courts will tend to apply the same standards in measuring an administrative decision involving a determination as to fraud."

28 So. Cal. Law Rev. 378.

"This determination by the administrative agency or official as to the necessity, is conclusive upon the courts unless shown to be arbitrary, capricious or in bad faith."

28 So. Cal. Law Rev. 372.

Numerous cases are cited in footnote 19 at this point in the article in which the courts were careful not to foreclose the power of the courts to inquire when the issue as to necessity did not go to the question of fact, but went to the question of whether the determination by the administrative board was "arbitrary, capricious or in bad faith." In one of these decisions it is stated that the right of eminent domain is a part of sovereignty, "but this does not mean, however, that no power may intervene to prevent arbitrary action and such

power certainly abides with the courts."

> Patten & Co. v. United States, 61 Fed. 2d 970 at 972, at which point other U. S. cases are cited.

In Stewart v. Department of Public Works, 168 N. E. 372, the Supreme Court of Illinois said,

> "The statute does not designate particular roads to be improved on route 165. It specifies the limits of the route, its general direction and the villages to be served. The Department of Public Works and Buildings is vested with authorities to select particular highways within reasonable limits, on the general route designated by the statute and to make such minor changes in the route as may be necessary for the best interest of the people of the state."

> Wiley v. Department of Public Works, 161 N. E. 783;
>
> People v. Department of Public Works, 150 N. E. 655;
>
> Mitchell v. Lowden, 123 N. E. 566.

The department does not have unlimited discretion in the location of the routes, but only such discretion as is provided by statute.

Watts v. Department of Public Works, 160 N. E. 201;

MacGregor v. Miller, 154 N. E. 707.

Where public officials are vested with discretionary power, a court of equity will not interfere to control such discretion unless fraud, corruption, oppression or gross injustice is shown.

Stratten v. Henkel, 151 N. E. 546;

Hill v. Kimble, 110 N. E. 18;

Hallett v. City of Elgin, 98 N. E. 530.

In City of Susanville v. Hessco, 45 Cal. 2d 684, at 692, the Supreme Court in interpreting section 5273, the conclusive evidence section above referred to, said:

> "It is urged that Section 5273 of the Streets and Highways Code made the determination of City Council 'conclusive in the absence of actual fraud' * * * obviously this section applies to those findings, conclusions and determinations which the Act authorizes the legislative body to make. It does not apply to every conceivable determination of such body for, if it did, no useful purpose would be served by the validation proceedings which contemplate judicial review."

CONCLUSION

It is respectfully submitted that important constitutional questions have been raised in this cause deserving of the consideration and protection of the Supreme Court of the United States with opportunity for full briefs and full argument.

Respectfully submitted,

PHILL SILVER

Attorney for Petitioners.

APPENDIX "A"

OPINION OF

THE DISTRICT COURT OF APPEAL

[4th Civil No. 6423. Fourth Appellate District. Filed July 28, 1961. E. J. Verdeckberg, Clerk.]

G. S. Sinclair, et al., Plaintiffs and Appellants, vs. The State of California, et al., Defendants and Respondents.

APPEAL from a judgment of dismissal after order sustaining a general demurrer to complaint without leave to amend and from an order denying motion to reconsider the ruling upon the demurrer, by the Superior Court of San Diego County. Charles A. Paulsen and Bonsall Noon, Judges. Judgment and order affirmed.

Phill Silver, for Appellants.

Stanley Mosk, Attorney General, Walter S. Roundtree, Asst. Attorney General, N. B. Peek, Deputy Attorney General, Robert E. Reed, Chief Attorney, Department of Public Works, George C. Hadley, Asst. Chief Attorney, and Paul E. Overton, for Respondents.

The plaintiffs, who are the appellants herein, as taxpayers and property owners along

a proposed freeway, filed a complaint against the State of California, the California Highway Commission, the Secretary of State of the State of California and the Department of Public Works of the State of California, as defendants who are the respondents herein, contending that the resolution of the commission locating the route for a proposed freeway was void; seeking a declaration to this effect; and asking that the defendants be enjoined from proceeding thereunder. The defendants demurred to the complaint; the demurrer was sustained without leave to amend; judgment of dismissal followed thereafter, the plaintiffs moved for a reconsideration of the ruling on the demurrer, for an order vacating the judgment and for permission to file a proposed amended complaint; the motion was denied; and the plaintiffs appealed from the judgment and the order of the denial.

The freeway in question involves a rerouting of State Route No. 2 (Sts. & Hy. Code sec. 302[a]) known also as United States Highway 101; would bisect the towns of Cardiff, Encinitas and Leucadia, which are located in the unincorporated territory of San Diego County; and is referred to by the plaintiffs as the "Inland Route."

The complaint, purportedly seeking declaratory relief and injunction, attempts to set forth three causes of action. The first cause of action concerns Section 90 of the Streets and Highways Code which provides that the Department of Public Works "is authorized and directed to lay out and construct all state

highways between the termini designated by law and on the most direct and practicable locations as determined by the Commission, " and is based on the contention that this code section is unconstitutional because it "does not provide an ascertainable standard to guide the Highway Commission in arriving at a determination as to what constitutes a 'most direct and practicable route, ' " and, for this reason, constitutes an unlawful delegation of legislative power to the Highway Commission. The allegations of the first cause of action in the proposed amended complaint are similar to those in the original complaint except for the additional allegation that the code section in question violates the due process clause of the United States Constitution. The second cause of action is based on the contention that the language of Section 90 is vague and uncertain in that it cannot be ascertained therefrom whether "the Highway Commission is required to select the most practicable route, or merely a practicable route, "which uncertainty renders the statute invalid and results in an unconstitutional delegation of legislative power. The allegations of the second cause of action in the proposed amended complaint elaborate on those contained in the original complaint but relate substantially the same subject matter and add the additional contention that the selection of any highway route under the subject code section would violate the due process clause of the 14th Amendment of the United States Constitution. The third cause of action is based on the contention that Section 90 requires the Highway Commission to adopt the most practicable route, and in doing so it is required to apply seven

criteria, i. e., whether the route should be preferred (1) which will bypass smaller towns, rather than one which will bisect such towns, (2) which will cause the displacement of the least number of homes, or (3) the least amount of disruption of existing public services, or (4) the least financial injury to the communities affected, or (5) the least adverse effect upon the general welfare of those communities, or (6) the loss of the least amount of tax revenue to the cities and counties affected, or (7) which will cause the State and the United States Governments the least total cost; and that in selecting the route in question the Highway Commission "acted in excess of the powers vested in it and was guilty of arbitrary and capricious conduct constituting an abuse of discretion" in that it refused to apply the foregoing criteria. By the third cause of action in their proposed amended complaint the plaintiffs also claim that the action of the Highway Commission was "a quasi judicial decision which is subject to judicial review"; and that an interpretation that the findings of the commission are not subject to review is a violation of the due process clause of the 14th Amendment of the United States Constitution. Each cause of action contained allegations purporting to state the existence of a controversy between the parties respecting the contentions heretofore noted. The plaintiffs prayed that Section 90 be declared unconstitutional; that the resolution of the Highway Commission selecting the Inland Route be declared void; and that the defendants be enjoined from taking any further action thereon.

A comparison of the allegations of the original complaint with those of the proposed amended complaint leads to the ready conclusion that no substantial difference exists between them; that no purpose would be served in permitting further amendment; and that if the demurrer was well taken, the order sustaining the same without leave to amend was proper. (Wing v. Forest Lawn Cemetery Assn., 15 Cal. 2d 472, 485; Town of Emeryville v. Durkee, 127 Cal. App. 2d 152, 155; Barrier v. Alexander, 100 Cal. App. 2d 497, 501.)

The Legislature has the constitutionally vested power to establish a system of state highways (Calif. Const., art. IV, sec. 36), which includes the power to locate and relocate that type of highway known as a freeway (Holloway v. Purcell, 35 Cal. 2d 220, 227-229); may delegate this power to an administrative agency "within the framework of a sufficiently definite primary standard" (Holloway v. Purcell, supra, 35 Cal. 2d 220, 231); and has done so by the adoption of Sections 71, 90, 100.2 and 100.3 of the Streets and Highways Code,[1] which designate the Highway Commission as such agency and fix the standards by which it shall be governed in the exercise of this power. In Holloway v. Purcell, supra, 35 Cal. 2d 220, 231-232, the court said:

> "The Legislature has adopted a policy of freeway construction in the public interest. It has properly delegated to the highway commission the authority to determine when and where freeways will be constructed, and it has properly

> required that the authority be exercised in accord with the needs of the public interest. Such a delegation of legislative power is valid."

This conclusion followed a consideration of Sections 100.1, 100.2 and 100.3 of the Streets and Highways Code about which the court stated:

> "The statutes in question require the commission to exercise its authority only on 'such terms and conditions as in its opinion will best subserve the public interest.' That requirement provides an adequate standard to guide the commission." (Holloway v. Purcell, supra, 35 Cal. 2d 220, 231.)

However, the plaintiffs contend that the court in Holloway v. Purcell, supra, 35 Cal. 2d 220, did not consider the authority of the commission to select a highway route, which is derived from Section 90 of the Streets and Highways Code, and did not pass upon the constitutionality of this code section; that the provisions thereof, which authorize the commission to select a route "on the most direct and practicable locations" between the termini designated by law, do not prescribe an adequate standard as a guide; that the language used therein is vague and uncertain in that it cannot be ascertained whether the commission is required to select the most practicable location or only a practicable location; that, for these reasons, Section 90 is an abortive, unconstitutional delegation of legislative power to an administrative agency (Jersey Maid Milk

Products Co. v. Brock, 13 Cal. 2d 620, 642); and, therefore, the resolution of the commission selecting the route in question is void.

The standard prescribed by Section 90 of the Streets and Highways Code, which authorizes the commission to select the most direct and practicable location for a highway, is supplemented by the standard prescribed by Section 71 of that code, which authorizes the commission to change the location of any highway when such "change is for the best interests of the State." These standards are sufficiently definite to guide the commission in the exercise of the powers conferred upon it by the Legislature; limit the exercise of those powers within the confines of a "primary standard" (Holloway v. Purcell, supra, 35 Cal. 2d 220, 230); and conform to those approved by the courts in similar situations. (Holloway v. Purcell, supra, 35 Cal. 2d 220, 231; Ray v. Parker, 15 Cal. 2d 275, 287-289; Jersey Maid Milk Products Co. v. Brock, supra, 13 Cal. 2d 620, 641-643, 655; Hecke v. Riley, 209 Cal. 767, 770, 774; Dominguez Land Corp. v. Daugherty, 196 Cal. 468, 484-486; Cal. State Auto, etc. Bureau v. Downey, 96 Cal. App. 2d 876, 900-907; National Broadcasting Co. v. United States, 319 U. S. 190, 225-226, [63 S. Ct. 997, 87 L. Ed. 1344]; J. W. Hampton, Jr. & Co. v. United States, 276 U. S. 394 [48 S. Ct. 348, 72 L. Ed. 624].) Appropriate standards for the purpose in question may be expressed in general terms, and need not detail the factors which are to guide the administrative agencies whose actions they govern. The contention of the plaintiffs to the contrary is not

supported either by reason or precedent.

The direction contained in Section 90 that the commission shall select "the most direct and practicable locations" for highways, is clear and unambiguous. The phrase "direct and practicable" as an entity describes the type of location to be selected, and the term "most" qualifies the total phrase. The contention of the plaintiffs that the language in question might be construed to mean "the most direct" and "a practicable location" relies upon a ridiculously strained construction. Furthermore, even though it be assumed that "the standard is not free of doubt as to its precise meaning, yet that fact furnishes no legal reason for declaring the act unconstitutional." (Jersey Maid Milk Products Co. v. Brock, supra, 13 Cal. 2d 620, 657; Lockheed Aircraft Corp. v. Superior Court, 28 Cal. 2d 481, 484; Pacific Coast Dairy v. Police Court, 214 Cal. 668, 676.) Assuming an ambiguity and the divisibility of the phrase "direct and practicable," reasonably construed the statute directs the commission to select that location which is most direct and most practicable. No basis exists for declaring it unconstitutional as vague and uncertain.

> "Statutes must be upheld unless their unconstitutionality clearly, positively and unmistakably appears." (Lockheed Aircraft Corp. v. Superior Court, supra, 28 Cal. 2d 481, 484.)

The contentions of the plaintiffs with respect to the unconstitutionality of Section 90 are without merit.

The plaintiffs also contend that the decision of the commission may be judicially reviewed if it is the result of arbitrary and capricious conduct amounting to an abuse of discretion; that the factual determination that a particular route is the most direct and practicable location for a highway is a condition precedent to a decision selecting such a route; that this factual determination is a quasi judicial function involving the exercise of a discretion which is subject to judicial review, and in the event an abuse of discretion appears will be set aside. Foundational to the plaintiffs' contention as noted is an adequate allegation of facts constituting arbitrary and capricious conduct. Both the complaint and the proposed amended complaint before us lack any allegation of fact constituting arbitrary and capricious conduct which would support an application of the principles relied upon by the plaintiffs as a basis for their third cause of action. The allegations of this cause of action are concerned with the commission's alleged refusal to consider the seven criteria which the plaintiffs claim should be considered by it in determining the most direct and practicable location for the freeway in question. These allegations, in substance, allege a failure by the commission to consider factors which the plaintiffs believe are controlling and, if considered, would have led to the selection of another route. In short, these allegations are sufficient to support a contention that the commission did not exercise its discretion in accord with the plaintiffs' ideas, but are not sufficient to support a conclusion that its action was the result of arbitrary or capricious conduct.

"Allegations that the acts of a commission or board were 'arbitrary, capricious, fraudulent, wrongful and unlawful,' like other adjectival descriptions of such proceedings, constitute mere conclusions of law which are not to be deemed admitted by a demurrer." (Faulkner v. Cal. Toll Bridge Authority, 40 Cal. 2d 317, 329; Lavine v. Jessup, 161 Cal. App. 2d 59, 70.)

In their third cause of action, and in their briefs, the plaintiffs refer to the foregoing conduct of the commission as amounting to an abuse of discretion. The evident purpose of such reference is to satisfy their contention that the commission was exercising a quasi judicial function and that its action, constituting an abuse of discretion, was subject to avoidance upon judicial review. However, the decision of the commission is not quasi judicial in nature but quasi legislative (People v. Chevalier, 52 Cal. 2d 299, 305; County of San Mateo v. Coburn, 130 Cal. 631, 635; Wulzen v. Board of Supervisors, 101 Cal. 15, 21; Sherman v. Buick, 32 Cal. 241, 252-253; Rindge Co. v. Los Angeles County, 262 U. S. 700, 709 [43 S. Ct. 689, 67 L. Ed. 1186]), and the charges of alleged misconduct do not constitute an abuse of discretion but in fact are an attack upon the wisdom of its action, which is not subject to judicial review. (Faulkner v. Cal. Toll Bridge Authority, supra, 40 Cal. 2d 317, 329; Berkeley High School Dist. v. Coit, 7 Cal. 2d 132, 137-138; Nickerson v. San

Bernardino, 179 Cal. 518, 522; County of Siskiyou v. Gamlich, 110 Cal. 94, 100; Wulzen v. Board of Supervisors, supra, 101 Cal. 15, 21; Lavine v. Jessup, supra, 161 Cal. App. 2d 59, 69-70; Ransom v. L. A. City High School Dist., 129 Cal. App. 2d 500, 505; cf. Stafford v. People, 144 Cal. App. 2d 79, 83.) By requesting the court to declare the resolution of the commission invalid, upon the ground that it acted in an arbitrary and capricious manner in refusing to accept the criteria suggested by them as its guide in selecting the freeway route under consideration, the plaintiffs seek to have the court prescribe the standard to guide the commission in the exercise of the functions delegated to it by the Legislature; as heretofore noted, the statutes delegating these functions have prescribed a legally adequate standard; and the court may not modify or enlarge that standard.

> "An administrative order, legislative in character, is subject to the same tests as to validity as an act of the Legislature." (Knudsen Creamery Co. v. Brock, 37 Cal. 2d 485, 494.)

This statement of the law is particularly pertinent to the instant case because Section 79 of the Streets and Highways Code provides that the statutory "delegation of power to the commission shall not be deemed exclusive, but any of the powers herein enumerated may continue to be exercised by the Legislature itself while in session." If the Legislature had made the decision which is attacked by the instant legal proceedings, the obvious falsity of the charge

of arbitrary and capricious conduct constituting an abuse of discretion, based on a refusal to accept the criteria advanced by the plaintiffs as a guide in making that decision, would be readily apparent. Under the stated rule, this charge is no less inapplicable because the decision was made by the commission. By this illustration the true attempted effect of the instant proceeding, viz., to modify or enlarge the standard prescribed by the Legislature as a guide, is exposed, and the unavailability of such a proceeding for this purpose is demonstrated.

Furthermore, the determination of the commission that a particular location is the most direct and practicable route for a prospective freeway is not a condition precedent to the exercise of the authority conferred by Sections 71 and 90 of the Streets and Highways Code, but is a result of the exercise of that authority. Thus a major premise of the plaintiffs' argument is without foundation.

The allegations with respect to denial of due process are wholly superfluous; do not find support in the facts alleged or the law as applied thereto; and do not give life to an otherwise nonexistent cause of action. The due process clause of the United States Constitution does not require either a hearing preliminary to the selection of a highway route, nor a judicial review of the decision of the commission in making such a selection. (Franchise Tax Board v. Superior Court, 36 Cal. 2d 538, 549; Ray v. Parker, 15 Cal. 2d 275, 296-297; County of Los Angeles v.

Rindge Co., 53 Cal. App. 166, 172-174.)

The plaintiffs also contend that, regardless of the merits of the controversy presented by their complaint, the general demurrer thereto should have been overruled; that it states a cause of action for declaratory relief because the facts alleged therein show the existence of an actual controversy between them and the defendants; that they are entitled to a declaration respecting this controversy whether the declaration so made is favorable or unfavorable to them, and rely upon the settled rule to this effect. (Salsbery v. Ritter, 48 Cal. 2d 1, 7; Columbia Pictures Corp. v. DeToth, 26 Cal. 2d 753, 760; Maguire v. Hibernia S. & L. Soc., 23 Cal. 2d 719, 728.)

It is equally well settled, however, that a judgment of dismissal following an order sustaining a general demurrer to a complaint seeking declaratory relief, when the controversy presented by the allegations of the complaint can be determined as a matter of law, will not be reversed where no prejudice to the right of the plaintiff has resulted from the procedural error incident to such an order and judgment. (Haley v. L. A. County Flood Control Dist., 172 Cal. App. 2d 285, 292-294; City & County of S. F. v. Budde, 139 Cal. App. 2d 10, 12; Davis v. City of Santa Ana, 108 Cal. App. 2d 669, 684; cf. Anderson v. Stansbury, 38 Cal. 2d 707, 717 - where the same principle was applied in sustaining a judgment of dismissal following an order granting a nonsuit; and Lavine v. Jessup, supra, 161 Cal. App. 2d 59, 69 - where a similar conclusion was based

on different reasons.)

The complaint in the instant case not only seeks a declaration respecting the constitutionality of Section 90 of the Streets and Highways Code and the validity of the decision of the Highway Commission in selecting the inland route, but also seeks to enjoin the defendants from taking any action under that resolution; two purported causes of action thus are set forth in the complaint without separately stating the same, i. e., one for declaratory relief and the other for an injunction; the facts alleged in support of the cause of action for injunction, i. e., those which would sustain a conclusion that Section 90 was unconstitutional and the resolution of the commission was invalid, necessarily are basic to the controversy alleged in support of the cause of action for declaratory relief; and the order of the trial court sustaining the general demurrer, which passed upon the insufficiency of the complaint to state facts sufficient to constitute any cause of action (Kessloff v. Pearson, 37 Cal. 2d 609, 613), of necessity determined that the statement of facts upon the issues respecting the unconstitutionality of Section 90 and the invalidity of the resolution were not sufficient, as a matter of law, to support the contentions of the plaintiffs in this regard. It is clear, therefore, that the order sustaining the general demurrer, as a practical matter, determined the controversy about which the plaintiffs sought a determination. It is equally clear that in the event of a reversal any judgment herein must follow the views expressed in this opinion, which becomes the law of the case; thus this

opinion in effect constitutes an express declaration with respect to the controversy presented; and a refusal to order a further expression of these views in a judgment by the trial court would not prejudice the rights of the plaintiffs in the premises. (Haley v. L. A. County Flood Control Dist., supra, 172 Cal. App. 2d 285, 293-294.) Under these circumstances a reversal should be denied. (Calif. Const., art. VI, sec. 4-1/2.)

The judgment and order are affirmed.

COUGHLIN
J.

I concur:

SHEPARD
Acting P. J.

FOOTNOTE 1:

Section 71. The commission may alter or change the location of any state highway if in the opinion of the commission such alteration or change is for the best interest of the State.

Section 90. The department shall have full possession and control of all state highways and all property and rights in property acquired for state highway purposes. The department is authorized and directed to lay out and construct all state highways between the termini designated by law and on the most direct and practicable locations as determined by the commission.

Section 100.2. The department is authorized to enter into an agreement with the city council or board of supervisors having jurisdiction over the street or highway and, as may be provided in such agreement, to close any city street or county highway at or near the point of its interception with any freeway or to make provision for carrying such city street or county highway over or under or to a connection with the freeway and may do any and all work on such city street or county highway as is necessary therefor. No city street or county highway shall be closed, either directly or indirectly, by the construction of a freeway except pursuant to such an agreement or while temporarily necessary during construction operations. No city street, county road or other public highway of any kind shall be opened into or connected with any freeway unless and until the California Highway

Commission adopts a resolution consenting to the same and fixing the terms and conditions on which such connection shall be made and the said commission may give or withhold its consent or fix such terms and conditions as in its opinion will best subserve the public interest.

Section 100.3. From and after the adoption of a resolution by the California Highway Commission declaring any section of state highway to be a freeway, the highway described in such resolution shall have the status of a freeway for all purposes of Section 100.2.

Such declaration shall not affect private property rights of access, and any such rights taken or damaged within the meaning of Article I, Section 14, of the State Constitution for such freeway shall be acquired in a manner provided by law.

No state highway shall be converted into a freeway except with the consent of the owners of abutting lands or the purchase or condemnation of their right of access thereto.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 616

G. S. SINCLAIR, *et al.*,

Petitioners,

vs.

STATE OF CALIFORNIA, *et al.*,

Respondents.

Respondents' Brief in Opposition to Petition for a Writ of Certiorari.

To the Honorable Supreme Court of the United States:

The respondents respectfully pray that a Writ of Certiorari requested by petitioners in the above-entitled case not issue.

Introduction.

This case deals with a resolution selecting and adopting a route for a proposed freeway in a portion of San Diego County, California.

On June 11, 1946, the State of California commenced a study of the area between San Diego and Carlsbad, California, for the purpose of determining whether U.S. 101 (California Legislative Route 2; California

Streets and Highways Code, Sec. 302(a)) should be relocated and improved to freeway standards. Since that time, over 38 public meetings and official hearings were held considering the routing and type of highway to be developed. On July 24, 1957, the route was selected and adopted. [Clk. Tr. p. 4, lines 17-22.] Following the route adoption and before the complaint was filed, more than 7 additional meetings and hearings were held in connection with the route as located, selected and adopted.

On March 13, 1959, a complaint was filed seeking to challenge the route as located, selected, and adopted by the California Highway Commission. [Clk. Tr. p. 1.] Demurrers were interposed by respondents. [Clk. Tr. p. 50 *et seq.*] As evidenced by the Clerk's Transcript, the cause was amply briefed so that the Superior Court of the State of California, in and for the County of San Diego, had before it all the applicable law. The arguments and hearing consumed one judicial day of time. During the hearing, the Honorable Charles A. Paulsen, Judge Presiding, inquired of petitioners' counsel and received the reply that all the matters which petitioners could plead had been incorporated. The demurrers to the complaint were sustained without leave to amend. [Clk. Tr. p. 134.] A motion to dismiss was granted. [Clk. Tr. p. 134.]

An appeal was taken by petitioners to the California District Court of Appeal, Fourth Appellate District. On July 28, 1961, the District Court affirmed the judg-

ment and the order. The written opinion of the Court is reported in Advance California Appellate Reports, Volume 22, Number 34, Pamphlet No. 3, and cited as *Sinclair v. State of California* (1961), 194 A. C. A. 415. (Pet. for Writ of Certiorari, Appendix A.)

A petition for hearing after decision by the District Court of Appeal was denied by the Supreme Court of the State of California September 20, 1961. None of the Justices were of the opinion a hearing should be granted.

The Petition for a Writ of Certiorari is sought for the purpose of reviewing the judicial determinations of the San Diego Superior Court, the Fourth District Court of Appeal and the California Supreme Court.

As developed in oral arguments, both in the San Diego Superior Court and the Fourth District Court of Appeal, the real issue sought to be raised is whether the highway should be constructed in the location where the California Highway Commission determined it should be located or somewhere else, *i.e.:* along the "Green Valley Route" proposed by plaintiffs.

In any event, there is no question but that the proposed freeway is for a legitimate public use.

I.
Reasons for Not Granting Petition.

The California courts have decided no federal question of substance which had not been theretofore determined by the United States Supreme Court.

A. A State Highway Is a Public Use.

It has been universally recognized from time immemorial that a highway is a legitimate public use.

Rindge Co. v. Los Angeles County (1923), 262 U. S. 700, 706, 67 L. Ed. 1186, 1192.

People v. Chevalier (1959), 52 Cal. 2d 299, 304, 340 P. 2d 598.

A freeway is a highway. California Streets and Highways Code, Sections 23 and 23.5.

This Court has held that while enforcing the Fourteenth Amendment to the United States Constitution it should keep in view and regard with great respect the judgments of state courts upon what should be deemed public uses in any state.

Rindge Co. v. Los Angeles County (1923), 262 U. S. 700, 705, 706.

B. Questions as to the Location of Highways Are Purely Legislative and Political, Outside the Scope of Judicial Inquiry.

The questions of whether or not to make a given public improvement, what plan should be used and the location of that improvement are purely political, do not require a hearing, and are not the subject of judicial inquiry.

Rindge Co. v. Los Angeles County (1923), 262 U. S. 700, 709, 67 L. Ed. 1186, 1193;

Oklahoma v. Atkinson Co. (1941), 313 U. S. 508, 527, 528, 85 L. Ed. 1487, 1501;

Arizona v. California (1931), 283 U. S. 423, 456;

Joslin Mfg. Co. v. Providence (1923), 262 U. S. 668, 678, 679, 67 L. Ed. 1167, 1175, 1176;

Adirondack Ry. Co. v. New York State (1900), 176 U. S. 335, 349, 44 L. Ed. 492, 499;

United States v. Gettysburg Elec. Ry. Co. (1896), 160 U. S. 668, 685, 40 L. Ed. 576, 582;

Shoemaker v. United States (1893), 147 U. S. 282, 298, 37 L. Ed. 170, 184;

Mississippi & Rum River Boom Co. v. Patterson (1878), 98 U. S. 403, 406, 25 L. Ed. 206, 207.

People v. Chevalier (1959), 52 Cal. 2d 299, 307, 340 P. 2d 598.

Where the intended use is public, the legislative decisions concerning the questions of the necessity or expediency for making a public improvement, its type or its location do not require a hearing thereon, and a hearing is not essential to due process in the sense of the Fourteenth Amendment.

Rindge Co. v. Los Angeles County (1923), 262 U. S. 700, 709; 67 L. Ed. 1186, 1193;

Bragg v. Weaver (1919), 251 U. S. 57, 58, 64 L. Ed. 135, 136;

Oklahoma v. Atkinson Co. (1941), 313 U. S. 508, 527, 85 L. Ed. 1487, 1501;

Adirondack Ry. Co. v. New York State (1900), 176 U. S. 335, 44 L. Ed. 492.

People v. Chevalier (1959), 52 Cal. 2d 299, 307, 340 P. 2d 598.

Whether a particular plan is feasible is not a proper matter for the courts to determine.

Oklahoma v. Atkinson Co. (1941), 313 U. S. 508, 528;

Ashwander v. T. V. A. (1935), 297 U. S. 288, 329;

Arizona v. California (1931), 283 U. S. 423, 456.

People v. Chevalier (1959), 52 Cal. 2d 299, 307, 340 P. 2d 598.

Courts do not exercise legislative judgment.

Oklahoma v. Atkinson Co. (1941), 313 U. S. 508, 527;

Hayburn's Case (1792), 2 Dallas 409, footnote at p. 410—at least not when sitting as judges.

People v. Chevalier (1959), 52 Cal. 2d 299, 307, 340 P. 2d 598.

The location of a particular public improvement is a matter of legislative discretion.

Oklahoma v. Atkinson Co. (1941), 313 U. S. 508, 528;

Adirondack Ry. Co. v. New York State (1900), 176 U. S. 335, 349;

Shoemaker v. U. S. (1893), 147 U. S. 282, 298.

People v. Chevalier (1959), 52 Cal. 2d 299, 307, 340 P. 2d 598.

Even the motives of those voting for the project are not subject to judicial inquiry.

Oklahoma v. Atkinson Co. (1941), 313 U. S. 508, 528;

Arizona v. California (1931), 283 U. S. 423, 455;

Rindge Co. v. Los Angeles County (1923), 262 U. S. 700.

People v. Chevalier (1959), 52 Cal. 2d 299, 307, 340 P. 2d 598.

A statute which fails to provide a landowner with a hearing before a legislative determination is made regarding the necessity for the public improvement or its location does not conflict with the 14th Amendment.

Rindge Co. v. Los Angeles County (1923), 262 U. S. 700, 709;

Adirondack Ry. Co. v. New York State (1900), 176 U. S. 335, 349.

A statute declaring a resolution finding upon the purely legislative and political questions of the type of a particular public improvement, and where it shall be located, does not deprive an owner of his property in violation of the 14th Amendment.

Rindge Co. v. Los Angeles County (1923), 262 U. S. 700, 710.

The filing of a proposed route map establishes no right against the owners of land along the route.

Adirondack Ry. Co. v. New York State (1900), 176 U. S. 335, 346.

No private property rights are acquired by the adoption of a California State highway route. Neither are any private property rights acquired by the declaration of a State highway route a freeway.

California Streets and Highways Code, Sec. 100.3.

This Court cannot assume that just compensation will not be paid for property required to be taken for public use.

Joslin Mfg. Co. v. Providence (1923), 262 U. S. 668, 674;

Oklahoma v. Atkinson Co. (1941), 313 U. S. 508.

Even possible adverse effects on local tax revenues as a result of the construction of a public improvement in the manner proposed does not prevent the exercise of the power of eminent domain to accomplish the project.

Oklahoma v. Atkinson Co. (1941), 313 U. S. 508, 534.

C. The "Due Process" Clause of the United States Constitution Does Not Require a Hearing Preliminary to the Selection of a Highway Route.

The California courts have correctly held that the due process clause of the United States Constitution does not require either a hearing preliminary to the selection of a highway route, nor a judicial review of the decison making the selection of the route.

The only issue sought to be reviewed is the location of the freeway.

An owner of property along a proposed highway route is not entitled to a hearing as to whether or not he agrees with the choice of the route or, whether he could suggest another route for the highway. Judicial refusal to consider the owner's contentions as to what constitutes the "best route" is proper.

Rindge Co. v. Los Angeles County (1923), 262 U. S. 700, 709;

People v. Chevalier (1959), 52 Cal. 2d 299, 303, 304, 307, 340 P. 2d 598;

Sherman v. Buick (1867), 32 Cal. 241, 252, 253;

Wulzen v. Board of Supervisors (1894), 101 Cal. 15, 21, 35 Pac. 353;

County of Siskiyou v. Gamlich (1895), 110 Cal. 94, 98, 42 Pac. 468;

County of San Mateo v. Coburn (1900), 130 Cal. 631, 634, 635, 63 Pac. 78, 63 Pac. 621;

Nickerson v. San Bernardino (1918), 179 Cal. 518, 522, 523, 177 Pac. 465;

County of L. A. v. Rindge Co. (1921), 53 Cal. App. 166, 172-174, 200 Pac. 27.

The more than forty-five hearings which have been held since June 11, 1946, were purely matters of legislative grace and were not required by the 14th Amendment to the United States Constitution.

Bi-Metallic Co. v. Colorado (1915), 239 U. S. 441, 445;

Rindge Co. v. Los Angeles County (1923), 262 U. S. 700, 709;

People v. Chevalier (1959), 52 Cal. 2d 299, 307, 340 P. 2d 598;

12 *Am. Jur.*, Sec. 618, p. 310;

Ray v. Parker (1940), 15 Cal. 2d 275, 296, 297, 101 P. 2d 665;

Franchise Tax Board v. Superior Court (1950), 36 Cal. 2d 538, 549, 225 P. 2d 905.

The true controversy in this proceeding is the petitioners' complaint that the California Highway Commission "chose the wrong route".

There is no contention in this case that the route adopted is located outside the confines of California Streets and Highways Code Section 302(a).

The delegation of authority to select routes, from the legislature to the California Highway Commission has been upheld by the California Supreme Court.

Holloway v. Purcell, 35 Cal. 2d 220, 217 P. 2d 665.

Constitutional "due process" is satisfied upon a showing that the use to be made of the public improvement proposed is a "public use" and that "just compensation" be made for property required to accomplish the improvement.

Petitioners have never contended (and, indeed cannot contend) that hearings were not held in this route adoption matter. They have only contended that the "wrong route" was adopted. The California courts have properly held that no justiciable issue is raised by petitioners' pleadings—*Sinclair v. State of California* (1961), 194 A. C. A. 415, 425, 426.

II.

Fourteenth Amendment of the United States Constitution Is Not an Issue in This Proceeding.

The second sentence of Section 1 of Amendment XIV states:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

As of this date, insofar as petitioners are concerned, the only State action taken is to have made a legislative determination to make a public improvement and to have located where the public improvement shall be constructed.

No life of any petitioner has been endangered. No petitioner's liberty has been circumscribed. Petitioners' property or properties have not been acquired.

How can the 14th Amendment be violated when no person's life, liberty, or property has been deprived? Speaking for this Court in *Bi-Metallic Co. v. Colorado* (1915), 239 U. S. 441, Mr. Justice Holmes said at page 445:

> "It appears to us that to put the question is to answer it. There must be a limit to individual arguments if government is to go on."

Applied in California in *Franchise Tax Board v. Superior Court* (1950), 36 Cal. 2d 538, 549, 225 P. 2d 905.

Accord:

Ray v. Parker (1940), 15 Cal. 2d 275, 296, 297, 101 P. 2d 665.

Conclusion.

Each point sought to be raised by petitioners in the Superior Court of San Diego County, in the District Court of Appeal, and in the California Supreme Court has been clearly stated and completely answered by the decision of the California District Court of Appeal, Fourth Appellate District.

Each of the questions of law sought to be presented in the Petition for Writ of Certiorari have previously been determined by the United States Supreme Court and the reported decision of *Sinclair v. State of California* (1961), 194 A. C. A. 415 is clearly in accord with the applicable decisions of the United States Supreme Court.

Respondents, therefore, respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

STANLEY MOSK,
Attorney General,
HOWARD S. GOLDIN,
Assistant Attorney General,
ROBERT E. REED,
Chief Attorney,
Department of Public Works,
R. B. PEGRAM,
Attorneys for Respondents.

Of Counsel:
GEORGE C. HADLEY,
N. B. PEEK,
Deputy Attorney General,
PAUL E. OVERTON,

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No. 616

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

G. S. SINCLAIR, et al.,

Plaintiffs and Petitioners,

vs.

STATE OF CALIFORNIA, et al.,

Defendants and Respondents.

PETITION FOR REHEARING

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1680 North Vine Street
Hollywood 28, California

Attorney for Petitioners.

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PETITION FOR REHEARING

TO THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT:

The appellants, G. S. Sinclair, et al , respectfully petition this Honorable Court for a rehearing of the petition for Certiorari in the above entitled cause and in support of this

petition represent to the Court as follows:

1. Heretofore the appellants filed a petition for a Writ of Certiorari with this Court. Thereafter the respondents, on January 20th, filed a brief in opposition to the granting of the petition. On February 19, 1962, the Court denied the petition for Certiorari.

ARGUMENT IN SUPPORT OF PETITION FOR REHEARING

The respondents have misconstrued petitioners' theory of its case and have perhaps misled the United States Supreme Court into denying the petition for Certiorari.

Respondent in its brief in opposition to the Petition for a Writ of Certiorari argues that the questions of whether or not to make a given public improvement, what plan should be used and the location of that improvement are clearly political, do not require a hearing and are not the subject of judicial inquiry. Numerous cases are cited, none of which are in point.

Petitioners do not dispute the law generally applicable to a resolution of necessity in eminent domain cases. In none of the United States Supreme Court cases cited by respondent was the issue herein raised passed upon by the respective courts, to-wit: that arbitrary action of a highway commission in the selection of a public highway is subject to judicial review for arbitrariness or abuse of discretion.

The decision of the California Supreme Court in People v. Chevalier, 52 Cal. 2d 299, is in disagreement with the courts of last resort of the overwhelming majority of the states. By denying recourse to the courts to review "ARBITRARY" action of an administration, the California Supreme Court has in effect prevented the protective application of the due process clause of the Fourteenth Amendment.

Basing its decision on a restricted interpretation of the Rindge case, 262 U. S 700, the California Supreme Court has drawn conclusions beyond the intended scope of the decision. The court there said.

> "The ranch owners were not prejudiced by the action of the trial court in striking out their special defenses in this behalf, since, under the general issues, they were entitled, as held by the District Court of Appeal, and were in fact permitted, to introduce all their evidence bearing upon this question."

Among the grounds urged by the petitioner for a hearing before this Court was a group of cases declaring actions of state courts denying litigants the opportunity to present their cases as constituting a violation of the due process clause of the Fourteenth Amendment.

Consistent with these cases are numerous decisions of this Court declaring that the constitutionality of a statute should not be decided on a demurrer. Typical of these cases are the following.

Borden's Farm Products v. Baldwin, 293 U. S. 194, where an appeal was taken from a decree of the District Court which dismissed on a motion equivalent to a demurrer a suit brought by the Borden Company to enjoin enforcement of a statute. In concurring, Justice Stone and Justice Cardoza stated:

> "We are in accord with the view that it is inexpedient to determine grave constitutional questions upon a demurrer to a complaint, or upon an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the questions clearer. "

In Polk v. Glover, 305 U. S. 5, an appeal was taken from a decree of a district court dismissing a suit to enjoin enforcement of a statute. In reversing, the United States Supreme Court said:

> "We think that the facts alleged in the bill were sufficient to entitle the plaintiffs to an opportunity to prove their case, if they could, and that the court should not have undertaken to dispose of the constitutional issues (as to which we intimate no opinion) in advance of that opportunity. * * * The salutary principle that the essential facts should be determined before passing upon grave constitutional questions is applicable. * * * And that determination requires a hearing in due course upon the issues raised by the pleadings. "

This was similarly recognized in Brock v. Superior Court, 12 Cal. 2d 605, 613, where the Supreme Court of California said:

> "Also a broad principle underlying the construction of statutes which, it is charged, deprive one of constitutional rights compels a trial of the issues presented by the plaintiff's complaint. One who attacks a statute upon that ground has the burden of showing that his rights have been invaded by the actual or threatened application of the challenged law to him. 'But where the legislative action is suitably challenged' said the Supreme Court of the United States in a recent case, 'and a rational basis for it is predicated upon the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice, these facts are properly the subject of evidence and findings'. "

The California Supreme Court citing Borden's Farm Products Co. v. Baldwin, 293 U. S. 194; Chastletown Corp. v. Sinclair, 264 U. S. 543; Hammond v. Schappi Bus Lines, 275 U. S. 164; Liverpool v. Integration Commissioners, 113 U. S. 33; Chicago v. Tompkins, 176 U. S. 167; Lincoln v. Lincoln, 223 U. S. 349.

The California District Court of Appeal in Masque Theatre Corporation v. City of Los Angeles, 170 Cal. App. 2d 310, similarly reversed a decision of a lower court which had

passed upon the constitutionality of an ordinance on a hearing of a demurrer. In that case an action was brought for declaratory relief for an adjudication of the right to exhibit a certain motion picture which the defendants allegedly claimed would be in violation of certain provisions of a Los Angeles City ordinance.

Quoting from the case of Burton v. United States, 196 U. S. 283, 295, the Appellate Court said:

> "Refusal to anticipate constitutional questions is peculiarly appropriate in the circumstances of this case; * * * only an adjudication on the merits can provide the concrete factual setting that sharpened the deliberative process especially demanded for constitutional decision."

See also dissenting opinions in the following cases:

Zorach v. Clauson, 343 U. S. 306, 322;

Hurt and Sons v. Dumond, 336 U. S. 525, 574;

Nippert v. Richmond, 326 U. S. 416, 437.

The questions presented in this case are not entirely free from doubt. Whether the issue of arbitrariness can be raised in cases involving the taking of land by eminent domain was left open in United States v. Carmack, 329 U. S. 230.

The present case, however, does not involve the constitutionality of a resolution of necessity in an eminent domain case It does involve the constitutionality of the preliminary action of a highway commission in selecting a route.

Typical, perhaps, and more appropriately parallel to the issues in the present case is Currie v. Glasscock County, 179 S. W 1095 (Court of Appeal, Texas, 1915) In that case a petition was filed asking that a writ of injunction issue against Glasscock County, its county judge and the members of the Commissioner's Court restraining them from opening, laying out and establishing a first class 60-foot public road through certain enclosed lands.

The plaintiff there alleged:

> "That said jury of view which so laid out said road made no effort whatever to lay same out along the most direct and practicable route to the said eastern line of said county; on the other hand, said body fraudulently and with the deliberate intent of running said road through the land of plaintiff and her children, when they well knew that said route was not the most direct and practicable route, but that such route would run practically due east, arbitrarily laid said road and they did to make it connect with a prior road in Sterling County, Tex., which was not laid out in the most direct and practicable route to the western boundary line of Sterling County

and in the direction of the county seat of said Glasscock County, but had been arbitrarily and fraudulently for the purpose of missing certain favorite pastures, diverted in a southwesterly direction when it should have run practically due west.

"That such running of said road in Glasscock County constitutes the grossest sort of abuse of the powers conferred upon said jury of view, and, instead of being in compliance with, was in violation, not only of the order of the court appointing them, but also with both the letter and spirit of the law."

The court said,

"The first question is: Is the alleged action of the commissioner's court subject to review by the District Court, or, as contended by appellee, is it simply an act within the discretionary powers of the commisser's court, therefore not subject to be reviewed?"

In reversing the judgment which followed the sustaining of demurrers to plaintiff's petition, the Appellate Court said:

"It is well established by the decisions of our courts that the district courts through their equitable jurisdiction, have the power to review and revise the exercise of the discretion vested in the commissioner's court, in cases of

this kind, where it is shown that such courts have grossly abused the discretion vested in them."

CONCLUSION

It is respectfully submitted that important questions of constitutional law have been raised in this case which should not have been determined upon demurrer. If the petitioners had failed to appropriately allege the allegations of arbitrariness, they should have been given opportunity to amend. Additionally, in the light of the cases mentioned above, they should have been granted the opportunity to present the evidence in support of the allegations of abuse of discretion and arbitrariness so pleaded.

It is respectfully submitted that a rehearing of the denial of the petition for Certiorari should be granted so that this Court may consider the petition filed herein after full briefs.

Phill Silver

PHILL SILVER, Attorney
for Petitioners

The undersigned, Phill Silver, Attorney for Petitioners, hereby certifies that the petition for rehearing filed in this cause is presented in good faith, that in his judgment said petition is restricted to the grounds specified in paragraph 2 of Rule 33, as amended, and said petition for rehearing is not interposed for delay.

Phill Silver

PHILL SILVER, Attorney
for Petitioners